

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF PUERTO RICO

IN RE:

MAXON ENGINEERING SERVICES INC

Debtor

MAXON ENGINEERING SERVICES INC

Plaintiff,

v.

ASPHALT PRECISION JJ, INC.

Defendant

CASE NO. 04-04781 MCF

Chapter 7

Adv. No. 07-0048 (MCF)

FILED & ENTERED ON 04/05/2010

DECISION AND ORDER

BACKGROUND

The debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on May 4, 2004 (Case No. 04-04781, Docket No. 1). On May 24, 2004, the debtor filed schedules and disclosed those payments made within ninety days of the filing of the bankruptcy petition (Case No. 04-04781, Docket No. 40 at pp. 114-135). The case was later converted to a proceeding under Chapter 7 of the Bankruptcy Code on June 13, 2006, and Noreen Wiscovitch-Rentas was appointed as interim trustee on June 14, 2006 (Case No. 04-04781, Docket No. 1003).

The Chapter 7 trustee filed the instant adversary proceeding

1 for recovery of certain preferential payments made to the defendant
2 on account of a prepetition debt on March 21, 2007 (Adv. No. 07-
3 048, Docket No. 1). On January 10, 2009, defendant requested the
4 dismissal of the adversary proceeding alleging that the complaint
5 at bar is time barred (Adv. No. 07-048, Docket No. 36). The
6 Chapter 7 trustee opposed the motion to dismiss contending that the
7 statute of limitations was equitably tolled (Adv. No. 07-048,
8 Docket No. 38). The trustee's argument is founded on the theory
9 that debtor's representative, as part of a predetermined strategy,
10 extended and prolonged the Chapter 11 case until the limitation
11 period expired in order to prevent the trustee from exercising
12 avoiding powers and suing insiders, who allegedly transferred
13 millions of dollars to the Dominican Republic, and others¹.

17 DISCUSSION

18 Section 546 of the Bankruptcy Code establishes a limitation
19 period on the trustee's ability to avoid prepetition preferences.
20 11 U.S.C. § 546(a) states that:

- 21 (a) An action or proceeding under section 544, 545, 547,
22 548, or 553 of this title may not be commenced after
23 the earlier of—
24 (1) the later of—
25 (A) 2 years after the entry of the order for relief;
or
(B) 1 year after the appointment or election of the
first trustee under section 702, 1104, 1163, 1202,
or 1302 of this title if such appointment or such
election occurs before the expiration of the period

1 Trustee filed a motion for summary judgment on December 22, 2008 (Adv. No. 07-048, Docket No. 32) which was opposed by defendant on January 10, 2009 (Adv. No. 07-048, Docket No. 37). The court did not consider these two documents for the reasons herein discussed. As such, the motion for summary judgment and its opposition are considered MOOT.

1 specified in subparagraph (A); or
2 (2) the time the case is closed or dismissed.

3 Pursuant to Section 546 of the Bankruptcy Code, a trustee's
4 limitation period for exercising avoidance actions for prepetition
5 preferences is two years after the order for relief or one year
6 after the appointment of a Chapter 7 trustee, if the trustee is
7 appointed within the initial two year period.
8

9 The present adversary proceeding was not filed within the two
10 years after the entry of the order for relief. Furthermore, the
11 appointment of the Chapter 7 trustee did not occur within the two
12 years after the entry of the order for relief. As such, by
13 utilizing a strict application of the statute of limitations found
14 in 11 U.S.C. § 546(a), the instant action would be time barred.
15

16 With regards to the Chapter 7 trustee's argument for extension
17 of the statute of limitations by way of equitable tolling, after an
18 extensive review of the trustee's contentions and independent
19 research performed by this court, the court finds that the opinion
20 expressed by the Honorable U.S. Bankruptcy Judge Gerardo A. Carlo
21 in the case of Maxon Engineering Services, Inc. v. Alex Hornedo
22 Robles & Assoc., et al, 397 B.R. 228 (Bankr. D.P.R. 2008), as
23 sustained in Wiscovitch-Rentas v. Jose D. Almonte, 2009 WL 349360
24 (D.P.R. 2009), Wiscovitch-Rentas v. Plastic Piping Products of
25 Puerto Rico, Inc., 2009 WL 393639 (D.P.R. 2009), and Wiscovitch-
Rentas v. Super Roof & General Contractor, 2009 WL 1286406 (D.P.R.
2009), is applicable to the instant case. Therefore, this court

1 adopts the well-reasoned opinion of Maxon Engineering Services,
2 Inc. v. Alex Hornedo Robles & Assoc., et al and will proceed to
3 dismiss the present adversary proceeding.
4

5 **ORDER**

6 **WHEREFORE IT IS ORDERED** that defendant's motion to dismiss
7 (Adv. No. 07-048, Docket No. 36) shall be, and hereby is, GRANTED.
8

9 **SO ORDERED.**

10 **Ponce, Puerto Rico, this 05 day of April, 2010.**

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15 **MILDRED CABAN FLORES**
16 **U.S. Bankruptcy Judge**

17 **C: DEBTOR**
18 **CARMEN D CONDE TORRES**
19 **NOREEN WISCOVITCH RENTAS**
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